2. Defendants filed a Rule 50 motion for judgment as a matter of law at the close of Plaintiff's case and at the close of all the evidence before submitting this case to the jury. Plaintiff thus did have prior notice of the fact that Defendants were challenging the sufficiency of the evidence.

3. Plaintiff viewed Defendants' Rule 59 Motion (Docket No. 84) as a motion notwithstanding the verdict. (Docket No. 99, Part III – Plaintiff's Argument, in Opinion and Order of May 5, 2003; *see also* Docket No. 85, Plaintiff's Opposition to Defendants Rule 59 Motion). Plaintiff was aware of Defendants' challenge as to the sufficiency of the evidence, given that in her opposition to the Rule 59 motion (Docket No. 85 , she fully argued in favor of the sufficiency of the evidence to support the jury verdict as to both compensatory and punitive damages. Consequently, Petitioner was on notice and forewarned as to the fact that Defendants were challenging the sufficiency of the evidence in the District Court.

REASONS FOR DENYING THE WRIT

I. Petitioner's Claim Is Unworthy of Review by this Honorable Court.

Petitioner asserts that this Honorable Court's decision in *Cone* and its progeny precluded the Court of Appeals for the First Circuit from reviewing the sufficiency of the evidence and ordering in this case that judgment be entered for the defendants after vacating a jury verdict for plaintiff. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967); *Johnson v. New York, N.H. & H. R.R.*

Co., 344 U.S. 48 (1952); *Fountain v. Filson*, 336 U.S. 681 (1949); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948). Those cases hold that, in the absence of a motion for judgment as a matter of law made in the trial court within ten days after the entry of judgment, Rule 50(b) normally forbids an appellate court to enter such a judgment. Petitioner's statement of the facts in this case is such that, on first impression, the reader is bound to instinctively conclude that the First Circuit Court of Appeals committed such error. As argued below, the procedural facts of this case allow us to distinguish it in such a manner as to make the general rule inapplicable and the case unworthy of review by this Honorable Court. Moreover, Plaintiff-Petitioner waived her waiver argument, because she failed to raise it or even mention it on appeal. Finally, in any case, the petition fails to present this Honorable Court with a compelling conflict between decisions of the Circuit Courts or a compelling federal question of any nature. Rather, petitioner's asserted error involves, at most, an alleged misapplication of a well-established rule of law, a run-of-the-mill issue for which a petition for a *writ* of *certiorari* should not be granted.

A. Considerations Governing Review on *Certiorari*

The reason set forth by Plaintiff for granting the Petition for writ of *certiorari* is that "the Court of Appeals for the First Circuit, contrary to decisions of this Court, reviewed the sufficiency of the evidence in the absence of a post verdict Rule 50(b) motion, thus ignoring this Honorable Court's precedent in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947)."

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

Nowhere in the petition for writ of certiorari does the petitioner address the factors enumerated by Rule 10 of this Honorable Court. At most, Petitioner has only asserted an error consistent with an "erroneous factual finding or **the misapplication of a properly stated rule of law**" pursuant to Rule 10 of this Court. In the latter instances, a petition for writ of *certiorari* is rarely granted. *See id.* The above-discussed issue is of such minor importance in the overall structure of the law that resolution by the highest Court is unnecessary.

Respondents contend that the instant petition should be denied because the decision below gave full consideration to the issues and decided them correctly; the issues raised by petitioner are not sufficiently important to warrant this Court's attention or, in other words, the issue raised lacks overall national importance; the allegedly conflicting decisions relied upon by petitioner are distinguishable on their facts the allegedly conflicting decisions relied upon by petitioner are distinguishable on the law; the questions presented by petitioner were not raised or preserved, and thus, were waived below; and, last but not least, the petition is void of a federal question of substance.

B. The Procedural Facts of this Case Distinguish it from *Cone* in such a Manner as to Make the Case Unworthy of Review by this Honorable Court.

Upon deciding in *Cone* that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within the term established by the rules, Rule 50(b) forbids an appellate court to enter such a judgment, this Court was acting on the basis of principles of fairness and had in mind practical considerations.[4] *See Johnson*, 344 U.S. at 53 (citing *Cone*, 330 U.S. at 217-18).

In *Cone*, this Court noted that Rule 50(b) provided alternatives to a trial court confronted with such a motion, because it did not contain any kind of language that absolutely required a trial court to enter judgment notwithstanding the verdict even though that court was persuaded that it had erred in failing to direct a verdict for the losing party. Rather, the rule provided the trial court with the alternative to determine, in meritorious circumstances, that the ends of justice would be better served by ordering a new trial. *See Cone*, 330 U.S. at 216. Through its subsequent opinions on this matter, this Court has sought to protect litigants from having their right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. *Cone*, 330 U.S. at 217. The present case is distinguishable for the following reasons.

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[4] The purpose of the renewed motion under Rule 50(b) is "to give the opposing party an opportunity to cure the defects in proof that might otherwise preclude him [or her] from taking the case to the jury." *Pachuta v. Massey-Ferguson*, 170 F.3d 125, 129 (2nd Cir. 1999) (citations omitted).

i. The Purpose of Rule 50(b) Was Served.

In the case presented for this Honorable Court's consideration, Defendants' failure to file a post-judgment Rule 50(b) motion did not preclude Plaintiff from arguing fully in defense of the verdict in her favor, or the trial court from passing judgment on the question. As discussed above, Defendants filed two motions for judgment as a matter of law under Rule 50(a), once at the close of Plaintiff's case, and again at the close of all the evidence, before the case was submitted to the jury. Furthermore, Plaintiff herself viewed Defendants' Rule 59 Motion as a motion notwithstanding the verdict. (Docket No. 99; *see also* Docket No. 85). Accordingly, Plaintiff was well-aware that Defendants were challenging the sufficiency of the evidence. Strict compliance with Rule 50(b) is not necessary when the purposes of the Rule have been served.[5] The court and Plaintiff were alerted as to the insufficiency of the evidence issue brought by Defendants.

As such, the objective of this Court's decisions in *Cone* was not undermined by the Court of Appeals' order that judgment be vacated for the plaintiff and entered for the defendants. As the District Court itself explained in its May 5, 2003 *Opinion and Order* (Docket No. 99), in her opposition to Defendants' Rule 59 motion requesting that the court set aside compensatory and punitive damages, Plaintiff had the opportunity to defend the sufficiency of the evidence and the lack of any argument in support of granting a new trial.

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[5] *See generally* 9A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2535.

ii. The Court of Appeals Was Authorized to Assess the Sufficiency of the Evidence.

Normally, "[t]o preserve for appeal a challenge to the denial of a pre-verdict motion for judgment as a matter of law, a movant must renew that motion after the verdict." *Varda v. Insurance Company of North America*, 45 F.3d 634, 638 (2nd Cir. 1995) (citing *Johnson*, 344 U.S. at 50, and *Cone*, 330 U.S. at 214-18, among others). "In the absence of a Rule 50(b) renewed motion *or extraordinary circumstances*, an appeal court is without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Pachuta*, 170 F.3d at 129 (emphasis added).

Extraordinary circumstances are present, however, where the failure to comply with the requirement that a post-judgment Rule 50(b) motion be filed should be overlooked "in order to prevent manifest injustice in cases where a jury's verdict is wholly without legal support." *Pachuta*, 170 F.3d at 129; *see also Varda*, 45 F.3d at 638. In those circumstances, however, the party challenging the sufficiency of the evidence on appeal may only seek a new trial, instead of a judgment in its favor. *Johnson*, 344 U.S. at 54; *see also Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 270 (5th Cir. 1998).

The Court of Appeals for the First Circuit has stated that "failure to comply with the strictures of Rule 50, our review is limited to whether the record reflects an absolute dearth of evidentiary support for the jury's verdict. . . . The district court will only be reversed when its ruling is obviously insupportable." *Zachar v. Lee*, 363 F.3d 70, 74 (1st Cir. 2004) (citing *Udemba*, 237 F.3d at 13-14).

Hence, the Court of Appeals for the First Circuit duly invoked his authority to assess the sufficiency of the evidence in the instant case. The only question is whether it was entitled to enter judgment in Defendants' favor, or whether it was limited to ordering a new trial. As discussed below, we argue that the Court of Appeals was entitled to enter judgment.

iii. Petitioner Has Waived Her Rule 50(b) Argument.

Petitioner waived waiver. She failed to raise before the Court of Appeals the issue of Defendants' failure to file a Rule 50(b) motion. Even though making a renewed motion for judgment as a matter of law is mandatory, it is not jurisdictional, and therefore "it can be waived, and, absent a request by appellee, the court of appeals has no duty to enforce the *Varda* requirement." *Norton v. Sam's Club*, 145 F.3d 114, 118 (2nd Cir.), *cert. denied*, 525 U.S. 1001 (1998) (citations omitted). The Second Circuit added that "since appellee had waived his challenge, we need not decide whether that would be appropriate in the case before us. . . . However, manifest injustice has been found where a plaintiff failed to prove one of the four essential elements of her claim." *Id.* at 638 (citations omitted). After all, "an argument not raised on appeal is deemed abandoned." *United States v. Quiroz*, 22 F.3d 489, 490-91 (2nd Cir. 1994).[6]

[6] *See also Anchor Fish Corp. v. Torry Harris, Inc.*, 135 F.3d 856 (2nd. Cir. 1998) (noting that appellees' failure to raise non-preservation defense could constitute waiver of that defense).

In this case, and as noted by the Court of Appeals for the First Circuit, "plaintiff has failed to allege defendants' forfeiture of the sufficiency of the evidence issue." *See Vázquez-Valentín v. Santiago-Díaz*, 385 F.3d at 29 n.8. Thus, Petitioner has waived her challenge and her argument is deemed abandoned. The Court of Appeals for the First Circuit decided the issue correctly.

C. The May 14, 2002 District Court's Opinion and Order Constituted a Premature Denial of Defendants' Argument in Support of their Rule 50(b) motion.

The District Court's issuance of its May 14, 2002 *Opinion and Order,* on the same day that the Jury returned a verdict in favor of Plaintiff and before defendants had the opportunity to file their Rule 50(b) motion for judgment as a matter of law, effectively constituted a premature denial of Defendants' arguments in support of their Rule 50(b) motion. Defendants' arguments with respect to a judgment as a matter of law effectively became moot, because the District Court's order relied on the validity of the jury's verdict. Under such circumstances, the Court of Appeals would have been justified in equitably modifying the procedures established by Rule 50(b), so as to shield Defendants from the unfairness that would have resulted from a mechanical application of those procedures.

II. This Honorable Court Should Not Reverse the Appellate Court's Decision.

If this Court were to consider issuing the writ of *certiorari*, we respectfully suggest that the writ should not

extend to other arguments not related to the sufficiency of the evidence and raised on appeal by Appellants, given that they were not reached by the Court of Appeals for the First Circuit because of the disposition of the sufficiency of the evidence argument.[7]

Moreover, even if this Honorable Court were to find Petitioner's argument to be correct, Respondents respectfully request that this Court vacate and remand (not reverse) with instructions to the appellate court, inasmuch as the aforementioned court did not have a chance to consider the other arguments raised on appeal by Appellants.

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[7] Defendants raised several arguments on appeal. Among them, first, the issue of the sufficiency of the evidence and the District Court's error in denying the Rule 50 motion; second, the district court's error in denying the admissibility of certain documents crucial for Defendants' defense; third, the presiding judge's allegedly prejudicial remarks in front of the jury; fourth, the district court ruling ordering plaintiff's reinstatement to her previous position; and, fifth, the denial of the qualified immunity defense; *see Vázquez-Valentín*, 385 F.3d at 29; *see also* Appendix A of Petition for Writ of *Certiorari*, at 15a-16a.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted.

In San Juan, Puerto Rico, this 27th day of July 2005.

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